

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

BARBARA SATTERFIELD, ET AL.,)	
)	
Plaintiffs,)	July 16, 2013
)	
-versus-)	7:11-1514
)	
)	Spartanburg, SC
NAPA HOME & GARDEN INC.,)	
ET AL.,)	
Defendants.)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE MARY G. LEWIS
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

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the transcript produced by computer.

1 Tuesday, July 16, 2013

2 (WHEREUPON, court was called to order at 2:02 p.m.)

3 THE COURT: This is the case of Satterfield and
4 others against Napa Home & Garden. It's Case
5 No. 7:11-1514. I think we're here for a motion to dismiss
6 by each of the third-party defendants and also a motion to
7 amend the scheduling order. Is that correct?

8 MR. PERSONS: Yes, Your Honor, it's a motion to
9 dismiss by several but not all of the defendants.

10 THE COURT: Not all, okay. All right.

11 MR. PERSONS: And a motion to amend the
12 scheduling order.

13 THE COURT: All right. Well, I've got one by
14 Berlin Packaging, CKS Packaging, MXI Environmental
15 Services, Ivystone, and Theo Morris; is that right?

16 MR. MOORE: Yes, Your Honor. Ray Moore for
17 Berlin. We understood our motion to be pending today.
18 I'm not sure if the briefing is closed on all of the
19 motions that have been filed.

20 THE COURT: Okay. All right. So are you going
21 to argue first?

22 MR. MOORE: Yes, Your Honor, if it suits Your
23 Honor's pleasure.

24 THE COURT: Okay. Be happy to hear from you.

25 MR. MOORE: May it please the Court? Your

1 Honor, my name is Ray Moore with the Murphy and Grantland
2 firm in Columbia. I represent Berlin Packaging, LLC, one
3 of the third-party defendants in this case. By way of
4 brief background on my client, we are a supplier of
5 packaging materials.

6 With regard to this case, Berlin did not
7 manufacture, assemble, or package any fuel gel that's
8 alleged in the underlying complaint. We are best known as
9 a bottle broker. If, in fact, the bottle involved in this
10 case came through my client, then the way it would have
11 occurred is that Fuel Barons, one of the principal
12 defendants or who was a principal defendant here, would
13 have selected the bottle from my client's catalog. My
14 client would have purchased the bottle which would have
15 been manufactured by CKS represented by Mr. Clarkson. And
16 it would have ended up in the chain of distribution with
17 the plaintiffs if all the facts are as alleged in this
18 case.

19 With respect to this case, there is no
20 relationship between my client, Berlin, and The Fresh
21 Market, and none has been alleged. Through -- when we
22 initially filed our motion to dismiss, we understood that
23 there were four causes of action, strict liability,
24 negligence, equitable indemnity, and contribution.

25 We understand now from the briefing that they

1 have been whittled down, essentially, to one cause of
2 action. The plaintiffs have abandoned -- excuse me, the
3 third-party plaintiffs have abandoned the strict liability
4 and negligence causes. They have not briefed the
5 indemnity cause probably on the basis that there's no
6 special relationship between us and none alleged.

7 And so now we're left with a contribution claim
8 which, really, I think makes up the bulk of what is before
9 Your Honor today. So the issue before Your Honor is, is
10 the South Carolina Contribution Acts requirement that a
11 party pay more than its pro rata share of a verdict or
12 settlement and extinguish the common liability before
13 bringing a contribution claim a procedural or a
14 substantive requirement?

15 If it is a procedural requirement, under Fourth
16 Circuit precedent, there's an additional inquiry that the
17 Court should make; and that is, is the so-called
18 procedural requirement intimately bound up with the state
19 law such that it should be handled under state law? And
20 then there would be a third requirement under Fourth
21 Circuit precedent; and that is, even if it is not
22 intimately bound up, do principals of state law and comity
23 suggest that the federal court should apply the state law
24 requirement as opposed to a federal rule?

25 Here, we suggest that the Court can end its

1 inquiry with the first level of analysis; and that is,
2 that this is, in fact, a substantive requirement. Why do
3 we say that? The Court need look no further than the
4 South Carolina Supreme Court's interpretation of the South
5 Carolina Contribution Act in the First General Services
6 vs. Miller case.

7 In that case, the Supreme Court addressed this
8 very issue in the context of a Rule 14 impleader involving
9 an indemnity claim on the one hand, similar to what is
10 alleged here, and a contribution claim on the other hand.
11 In that case, the Supreme Court, under a different set of
12 facts, allowed an indemnity claim to go forward, in a
13 sense accelerated the indemnity claim even though no
14 judgment or settlement had been paid in that instance
15 because there was a special relationship between the
16 third-party plaintiff and the third-party defendant.

17 In that case, however, the Supreme Court treated
18 the contribution claim differently. They treated the
19 statutory requirement of a prepayment of the common
20 liability as a substantive requirement to bring the claim.
21 We submit to Your Honor that the analysis under Rule 14 of
22 the state court rule, the operative language of which is
23 identical to Rule 14 of the Federal Rules of Civil
24 Procedure suggested to the Supreme Court that they would
25 allow the indemnity claim to proceed but disallow the

1 contribution claim because it had not yet accrued. In
2 this case we suggest the same result.

3 Here, the indemnity claim that existed in First
4 General Services does not exist because there's no special
5 relationship and because, even if everything they have
6 pled is true, they would come in as joint tortfeasors with
7 no right of recovery under our state court cases of Scott
8 v. Fruehauf and the Vermeer case that are cited in our
9 papers.

10 So to the contribution claim, once again, the
11 Supreme Court disallowed it as a substantive matter
12 because no prior payment had been made and none has been
13 made and none has been alleged here.

14 Why would the South Carolina Supreme Court treat
15 it as substantive? Well, first, we submit because the
16 language of the statute suggests that it's substantive.
17 The right does not accrue. Similar to a statute of
18 limitations that would terminate a right, the state
19 contribution act creates a right that accrues at a
20 specific point in time; and that is, when more than a pro
21 rata share of common liability has been paid and the
22 liability of the putative third-party defendant here has
23 been extinguished. Neither one of those things have
24 occurred.

25 And so it's important to point out to the Court

1 that the -- that this should not be accelerated as a
2 claim, as the third-party plaintiff has suggested, because
3 the claim has not accrued, number one. And significantly,
4 because my client's right or my client's potential
5 obligation can still be extinguished through no conduct or
6 operation of the third-party plaintiff. And I would turn
7 to --

8 THE COURT: Well, let me ask you something.
9 That case, the South Carolina Supreme Court case --

10 MR. MOORE: Yes, Your Honor.

11 THE COURT: In -- I see how they ruled, but
12 there is language in their discussion about Rule 14.

13 MR. MOORE: Yes.

14 THE COURT: And they say at any time after
15 commencement of the action of a defending party, a
16 third-party plaintiff may cause a summons and complaint to
17 be served upon a person not a party to the action who is
18 or may be liable. What does that -- what does the may be
19 liable mean? I mean, it sounds to me like it's at least
20 for some purposes recognizing sort of a contingent --

21 MR. MOORE: Sure. And I believe that operative
22 language is the same language as the federal rule. And in
23 the case of indemnity in First General Services, the Court
24 acknowledged that they may be liable. And therefore, as a
25 procedural matter, it was allowed even though the

1 liability --

2 **THE COURT:** So it's under the indemnity.

3 **MR. MOORE:** Under the indemnity even though it
4 wasn't a certainty. That's why I think it's so important
5 that here at this point my client may not -- cannot be
6 liable to the third-party plaintiff because they have not
7 extinguished my liability. They have not pled that they
8 have obtained a release, paid more than their pro rata
9 share, and extinguished my liability. And until that
10 occurs, they have no right. And that's what the Supreme
11 Court recognized as a substantive right in First General
12 Services. Until that occurs, I can extinguish a right to
13 contribution under the terms of the contribution act by
14 reaching a good faith settlement with the plaintiff.

15 So for that reason, we suggest that the Supreme
16 Court has answered the question. Indemnity, it's
17 procedural; contribution, it's substantive. And that the
18 question of whether it should be allowed under the federal
19 rules is no under the Erie and Hanna vs. Plumer analysis.

20 **THE COURT:** Okay.

21 **MR. MOORE:** The third-party plaintiff has cited
22 to Your Honor two district court cases from Judge Norton
23 and one case -- unreported case from Judge Currie that
24 suggests different results. And we would respectfully
25 submit to Your Honor that the Brown case, Judge Norton's

1 case, was wrongly decided and should not be followed in
2 this instance for several reasons.

3 First, if you would look at the text of the
4 Brown vs. Shredex case, you'll see that the Judge Norton
5 did not compare the treatment that the South Carolina
6 Supreme Court gave to indemnity as a procedural matter and
7 contribution which was a substantive rule. So we believe
8 that if the Court looks at the difference and the
9 dichotomy between that indemnity and contribution in the
10 First General case, you will -- it will suggest that this
11 is a substantive requirement.

12 The second thing is that the Brown case did not
13 account for the requirement that the third-party plaintiff
14 or the party seeking contribution obtain the release of
15 the party who it's seeking contribution from. Not been
16 done here. The decision did not account for the fact that
17 the claim against my client would have to be extinguished
18 in order to give the right to contribution.

19 The critical distinction in my mind in the Brown
20 case is that Judge Norton did not discuss the Fourth
21 Circuit precedent and the Fourth Circuit analysis. And
22 that's the three-prong analysis that I gave to Your Honor
23 to start with that's in the -- there are two Beech
24 Aircraft cases and the -- I believe it's the Schmucker
25 Manufacturing case {verbatim} that's cited in our papers.

1 I apologize if I got the name wrong.

2 So the three-pronged analysis, is it
3 substantive? We believe it's yes. But even if the Court
4 finds that it's not substantive, the Fourth Circuit would
5 require a further look, is it intimately bound up in the
6 state law? And if the Court over --

7 **THE COURT:** What are you looking at to determine
8 that? That sounds like those words that don't mean a lot
9 to me.

10 **MR. MOORE:** Not familiar with it? In this case,
11 what I think you would look at is the requirement that
12 we're discussing is found within the text of the statute
13 given by the general assembly. In one of the Fourth
14 Circuit cases that we've cited to Your Honor, Hottle vs.
15 Beech Aircraft, the Fourth Circuit wrestled with the issue
16 in the context of an evidentiary rule, a substantive
17 evidentiary rule in Virginia that would have prohibited
18 the admission of evidence of internal procedures. And of
19 course, in many states, including South Carolina, evidence
20 of internal procedures and policies has been offered to,
21 when the defendant doesn't act in conformity therewith,
22 it's evidence of negligence. In Virginia, the substantive
23 rule was different. And it was an evidentiary common law
24 rule and the court said despite the Federal Rules of
25 Evidence, if a court's sitting in diversity, we must apply

1 the Virginia substantive rule, or in that case, they said
2 it was intimately bound up with Virginia state policy.
3 And here, I would submit to Your Honor, that the
4 requirement of extinguishment of my liability and payment
5 of more than their pro rata share is intimately bound up
6 at the least with the state statute created right of
7 contribution.

8 And there are valid reasons that our
9 legislature, and indeed the Supreme Court, would want to
10 prescribe how broadly we can cast the contribution net.
11 We've -- I've heard for years and years, before even
12 graduating law school, the oft cited maxim that the
13 plaintiff is the master of her complaint. And of course,
14 this rule destroys that maxim that the plaintiff is the
15 master of her complaint. What they're seeking to do is
16 something that plaintiffs often specifically and
17 intentionally decide not to do; and that is, not to name
18 so many parties such that the liability picture may be
19 diluted or apportionment of fault may not be spread among
20 multiple defendants.

21 The Brown case is a perfect example of why the
22 rule is wrong. In the Brown -- of why that decision was
23 wrong. In the Brown case, the plaintiff brought an action
24 against a paper shredder seller. And the paper shredder
25 seller attempted to implead the plaintiff's father or the

1 ward's father. So what the court -- what the court then
2 effectively would allow is an allocation or imputation of
3 fault to a non-party.

4 So the way that that would bear out in this case
5 is -- if the Court were to permit this third-party claim,
6 then there would be questions with regard to the
7 third-party defendants whether we would become
8 fourth-party plaintiffs and address with those involved in
9 the situation that brought about this tragic accident, was
10 there -- are there other conceivable, potentially
11 responsible parties who should be fourth-party defendants?
12 Should the person who ignited the pot, should the person
13 who poured the gel fuel be a fourth-party defendant? And
14 we would submit under the First General Services case, the
15 answer would be no.

16 Should the Court follow Brown vs. Shredex and
17 the Tetra Tech case, which I would not concede that that
18 decided the issue, but if the Court followed that, then
19 the next step would be the continued so-called shotgun
20 approach that we've seen with the naming of these seven or
21 eight defendants with additional fourth-party defendants,
22 really only constrained by the imagination of a defense
23 lawyer who suddenly fancies himself a plaintiff's lawyer
24 trying to decide how many people he can --

25 **THE COURT:** Big mistake.

1 **MR. MOORE:** So what are the constraints? Well,
2 in the indemnity situation, there are common law
3 constraints. You can't just willy-nilly sue anyone for
4 equitable indemnity. You can sue someone you have a
5 special relationship with under the long line of South
6 Carolina cases dealing with equitable indemnity. And you
7 also have to prove that you're without fault. So it's
8 basically an imputed-fault situation.

9 We don't have the same constraints under
10 contribution. The legal remedy doesn't have the same
11 constraints as the equitable remedy. So we need some
12 constraints. And the legislature put them in and the
13 Supreme Court recognized them. And the constraint is that
14 you have to have resolved the common liability and you
15 have to obtain the release and pay more than your pro rata
16 share. Any time before that, I can extinguish my own
17 liability. I can extinguish my liability for contribution
18 by a settlement.

19 So with all of that being said, we believe that
20 it is very clearly a substantive law, a substantive right,
21 not a procedural issue. And I don't believe Judge Norton
22 addressed the Fourth Circuit law on how to distinguish
23 between these. He did acknowledge Wright and Miller and
24 their commentary on it, none of which has addressed and
25 none of which dealt with the South Carolina Contribution

1 Act, none of which addressed the First General Services
2 case decided by our Supreme Court.

3 I believe that's all I wanted to present to Your
4 Honor. I appreciate the opportunity to be here.

5 **THE COURT:** Okay. Thank you.

6 **MR. PERSONS:** May it please the Court? Ray
7 Persons for The Fresh Market. I don't fancy myself a
8 plaintiff's lawyer, although I have nothing against
9 plaintiff's lawyers. We're simply seeking to enforce the
10 procedure provided under Rule 14 of the Federal Rules of
11 Civil Procedure that allow for contribution claims to be
12 asserted. Judge Norton in the Brown case, and more
13 recently, Judge Currie in the Tetra Tech case got it
14 right. It's procedural. The right is created, but
15 whether it accrues or not, that's purely procedural.

16 As Judge Norton said in Brown, If the governing
17 law recognizes a substantive claim, its accrual and the
18 method of its presentation are properly regarded as
19 procedural. The impleader rule properly applies to
20 accelerate the claim even if state law does not permit its
21 accrual or assertion until after the defendant has
22 incurred a loss. That's precisely the situation that
23 we're in here. And that's the rights that we're seeking
24 to have enforced.

25 It remains to be determined whether there will

1 be joint and several liability or whether there will be
2 liability whatsoever. But that does not preclude the
3 bringing of the impleader action at this juncture in the
4 proceedings.

5 So I would respectfully submit that the Court
6 should follow the decisions by Judge Norton and Judge
7 Currie, in the Brown and Tetra Tech cases respectively,
8 and permit The Fresh Market's third-party claims to go
9 forward. And I'm happy to answer any questions.

10 **THE COURT:** Are we correct that all you have now
11 against these particular third-party defendants is the
12 contribution claim?

13 **MR. PERSONS:** Yes, Your Honor.

14 **THE COURT:** All right. I wanted to make sure.

15 **MR. PERSONS:** Yes. We don't have the -- we've
16 reassessed the validity of the equitable contribution
17 claims. And in light of South Carolina Supreme Court
18 precedent, we can't bring those, not as to these
19 third-party defendants. And we're not bringing
20 independent negligence and strict liability claims against
21 these defendants. These claims are purely derivative and
22 contribution.

23 **THE COURT:** All right.

24 Would anyone like to speak in reply?

25 **MR. CLARKSON:** May it please the Court? I'm

1 Heyward Clarkson and I represent CKS Packaging.

2 **THE COURT:** Yes, sir.

3 **MR. CLARKSON:** And the only thing I want to
4 emphasize, it's already been brought up before, but in
5 Fresh Market's prayer for relief in their third-party
6 action, they're trying to add these third-party defendants
7 as first-level offenders and they can't do that. The
8 plaintiff can sue who they choose to sue and who they
9 choose not to sue. And that's been the law forever. And
10 under their prayer for relief, what they're attempting to
11 do is have these third-party defendants, under the theory
12 of contribution, which they can't do which has well been
13 covered, to make them a first-party defendant being sued
14 by the plaintiff, which they didn't do. And so that just
15 messes up the whole system. And I think that is just
16 basic law, that the plaintiff can sue who they want to
17 sue. And a defendant can't change that in the course of
18 the litigation.

19 **THE COURT:** All right. Thank you.

20 Yes, sir?

21 **MR. MARION:** May I?

22 **THE COURT:** Sure.

23 **MR. MARION:** She told me to come up and speak
24 where she could hear me. Frankie Marion representing MXI.
25 Before I do, I want to thank the Court for the

1 accommodation last week so that I and other members of my
2 firm and other attorneys could attend the funeral.

3 **THE COURT:** You're welcome.

4 **MR. MARION:** We greatly appreciate that. The
5 only thing I would add that's particular to MXI is under
6 the allegations of the complaint by The Fresh Market in
7 that there's no allegation that it did anything, wrong or
8 otherwise. And I would call the Court's attention to
9 Paragraph 16 of the third-party complaints on Page 4. And
10 it -- and I'll just read it. It says, Upon information
11 and belief, MXI manufactured, distributed, and sold
12 denatured ethanol to manufacturers of fuel gel to be
13 included as its primary ingredient.

14 Well, I'm not conceding that point. I don't
15 know that we did. But assuming that to be true, so what?
16 Ethanol's a fuel. We had no design -- there's no
17 allegation we designed the fuel, we mixed it, had anything
18 to do with the fuel gel. We didn't install it. We didn't
19 have a duty to put warnings.

20 **THE COURT:** But y'all haven't done discovery
21 yet, have you?

22 **MR. MARION:** But they still have to allege
23 something against us. The fact that we manufactured a
24 product, in and of itself, means nothing. There's nothing
25 in here that ties us to The Fresh Market, number one. But

1 beyond that, there's nothing here that ties us to
2 anything. We just manufactured alcohol. And I guess, not
3 trying to be flip, but so what? It's a fuel. They have
4 to allege something else that we did, that either it was
5 defective or that we had some involvement with the
6 ultimate product. They've alleged none of that.

7 And so disregard -- going a step beyond what's
8 already been argued, here there has to be some allegation
9 so we know what we're fighting against. And I would --
10 under the Twombly and other cases, they have to allege
11 facts, an essence of facts, a central fact so that we can
12 determine what the basis of our liability is. They have
13 done -- not done that. Being a manufacturer does not do
14 that. There has to be something more.

15 So at this stage, I submit, they haven't. The
16 pleadings are too bare bones. They haven't asserted
17 enough against MXI to make any type of nexus to any of the
18 allegations in the primary complaint.

19 **THE COURT:** Okay.

20 **MR. MARION:** Thank you.

21 **THE COURT:** Any response to that?

22 **MR. PERSONS:** Yes, Your Honor. If I understand
23 the argument, it's an 8(a) argument. Essentially, that
24 they haven't been placed on notice of what it is they're
25 being accused of. And I would humbly submit that if the

1 contaminant, the ethanol was -- if the ethanol was
2 contaminated, then that would constitute a product defect.
3 It remains to be determined whether that's the case
4 because we are going to embark on discovery to find out.
5 And if we learn that to be the case, then we can come back
6 and seek leave to amend to more clearly and further
7 delineate that. But this is not the stage in which that
8 needs to be or should be addressed, certainly not against
9 us.

10 **THE COURT:** Maybe you could be a plaintiff's
11 lawyer.

12 **MR. PERSONS:** Well, I'm working on it. But
13 that's where we are. And I would submit to the Court that
14 discovery should add to the body of knowledge that we can
15 bring to bear on these pleadings and on these proceedings.
16 And so I'd respectfully request that that motion be
17 denied.

18 **THE COURT:** All right.

19 **MR. PERSONS:** Thank you.

20 **THE COURT:** Okay. Thank you. Well, I'll take
21 that under advisement.

22 You also have a motion to amend the scheduling
23 order and have 30 extra days from whenever I issue my
24 ruling on these motions. It was a joint motion, right?
25 All right. Well, I'll grant that motion and get my order

1 out on these motions to dismiss as soon as I can.

2 **MR. MOORE:** Just for point of clarification,
3 does that mean that the deadlines that existed in the
4 order that was in place before my client was added,
5 they'll be backed up to 30 days -- beginning 30 days from
6 the date Your Honor issues?

7 **THE COURT:** Well, I don't know. Y'all submitted
8 the order. I don't know what you're intending to do.

9 **MR. MOORE:** Okay. I would suggest that the
10 point when Your Honor issues your ruling would be kind of
11 the new commencement date. And then the dates that were
12 in place would be backed up to that point as opposed to
13 wherever we were because we weren't involved in the case
14 at that time.

15 **THE COURT:** That's -- is that -- am I
16 understanding that correct? That's kind of what I
17 thought.

18 **MS. CLARE:** The motion that we filed, Your
19 Honor, was a motion that the parties would come back
20 within 30 days and submit a new revised scheduling order.

21 **THE COURT:** Oh, well, why don't we do that.
22 That way you'll have time to get that all worked out. And
23 I'll get the order out on the motions to dismiss as soon
24 as I can. Thank you.

25 (WHEREUPON, court was adjourned at 2:30 p.m.)

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

s/Karen E. Martin

2/24/2014

Karen E. Martin, RMR, CRR

Date

Karen E. Martin, RMR, CRR
US District Court
District of South Carolina